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No. 98-28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CARPENTERS LOCAL 209,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Ninth Circuit correctly find that the District Court did not abuse its discretion in granting an injunction pursuant to the fraud exception of the Norris La-Guardia Act, enjoining the Union from displaying a banner outside of Anheuser-Busch's Van Nuys brewery, which stated, "Budweiser Has Rats In Their Brewery," a statement which would commonly be understood to mean that Anheuser-Busch's Van Nuys brewery has a rodent problem, and which the Union knew to be false?

Did the District Court and the Ninth Circuit correctly conclude that the Union's banner, stating that "Budweiser Has Rats In Their Brewery," and which was displayed outside Anheuser-Busch's Van Nuys brewery, was unprotected by the First Amendment, because the most natural reading of the statement is that Anheuser-Busch's Van Nuys facility has a rodent problem, a statement of fact which the Union knew to be false?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Carpenters Local 209 and Respondent Anheuser-Busch, Inc. Anheuser-Busch, Inc.'s parent company is Anheuser-Busch Companies, Inc. The only nonwholly owned subsidiary of respondent Anheuser-Busch, Inc. is Somerset Distributors, LLC.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Anheuser-Busch, Inc. ("Anheuser-Busch") respectfully submits this Opposition to the Petition for Writ of Certiorari by Carpenters Local 209 ("the Union"), for review of the judgment of the Ninth Circuit Court of Appeals in *Anheuser-Busch, Inc. v. Carpenters Local 209*, 9th Cir. No. 97-56305, entered on February 27, 1998.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit, issued on February 27, 1998, is not reported, but is attached as Appendix B to the Union's Petition. The order of the United States District Court for the Central District of California, granting a preliminary injunction, issued on September 17, 1997, is unreported, but is attached as Appendix C to the Union's Petition. The District Court's temporary restraining order, issued on September 10, 1997, also is unreported, but is attached as Exhibit D to the Union's Petition.

JURISDICTION

Anheuser-Busch agrees with the Union's statement of jurisdiction.

STATUTES INVOLVED

1. The Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, is set forth in Appendix G of the Union's Petition.

2. The Lanham Act, 15 U.S.C. §§ 1125(c) and 1127, is set forth in Appendix G of the Union's Petition.

3. The First Amendment of the United States Constitution is set forth in Appendix G of the Union's Petition.

STATEMENT OF THE CASE

This action grew out of the Union's dispute with H.M.S., Inc. ("HMS"), a small construction company that has two employees working at Anheuser-Busch's Van Nuys, California brewery. In furtherance of that dispute, the Union launched a smear campaign against Anheuser-Busch. On July 23, 1997, the Union began picketing in front of Anheuser-Busch's Van Nuys brewery. On July 24, 1997, Anheuser-Busch obtained a temporary restraining order ("TRO") in state court, which prohibited the Union from blocking brewery entrances and engaging in violence or other unlawful conduct.

Then, on approximately August 5, 1997, the Union stationed picketers in front of Anheuser-Busch's Van Nuys brewery, who manned two large banners, each of which were approximately 20 feet long and 5 feet tall. In very large 12-inch, bold-faced, red and blue letters, the banners stated, "Budweiser HAS RATS"; in 6-inch letters "IN THEIR BREWERY"; and in 5-inch letters not reasonably visible to the public passing by in their automobiles, "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." The word "Budweiser" was printed in the same style and color as the large Budweiser lettering displayed on the facade of the brewery, and which is a federally registered trademark. Petition, Appendix ("App.") A, 1a.

On August 6, 1997, Anheuser-Busch returned to the state court from which it already had obtained an injunction, and requested relief from the Union's use of fraudulent statements implying that there were rodents in Anheuser-Busch's Van Nuys brewery. The parties stipulated to a preliminary injunction continuing to regulate the Union's picketing, but the state court declined to enjoin the Union's use of the phrase, "Budweiser HAS RATS IN THEIR BREWERY."

On August 27, 1997, Anheuser-Busch filed a complaint in federal court, asserting federal causes of action for trademark infringement and trademark dilution, and a claim for fraud. On September 4, Anheuser-Busch requested that the District Court issue a TRO enjoining the Union from using the Budweiser trademark and the phrase, "Budweiser HAS RATS IN THEIR BREWERY." The court issued the TRO on September 10, 1997, and ordered a hearing on the preliminary injunction for September 15, 1997.

On September 15, 1997, both the Union and Anheuser-Busch appeared for the hearing and filed declarations and summaries of the witnesses' proposed testimony. Both sides also brought their witnesses to the hearing in the event that cross-examination or further testimony was necessary. Both the Union and Anheuser-Busch also submitted nonconflicting photographs of the Union's banner. *See* App. A In addition to the proposed testimony and photographs of the banner, Anheuser-Busch lodged a videotape with the court, containing statements of a Union member regarding the meaning and intent of the phrase "Budweiser HAS RATS IN THEIR BREWERY." The Union member stated:

> Rats eat Budweiser. They're going to love that, man. They're going to fucking love it. . . . Rats in the beer. That's going to go over like a ton of shit, pal. You take that to your fucking board members. Rats in the fucking beer.

The contents of the videotape also were summarized in the proposed testimony of Chris Harden, the Manager of Environmental Health & Safety assigned to Anheuser-Busch's Van Nuys facility.

At no time during the hearing did the Union ask the Court to hear testimony from its witnesses or to cross-examine Anheuser-Busch witnesses. Both parties proceeded based on the summaries of proposed testimony and documents that were filed before the hearing.

At the September 15, 1997 hearing, the District Court found that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*

("NLA"), governed the case. Based on the undisputed evidence submitted by both sides, the District Court indicated that it had made all of the findings of fact required by the NLA.[1] Indeed, the court separately addressed each requirement, and so stated in its September 17, 1998 Order Granting Preliminary Injunction.

In issuing the September 17, 1998 Order Granting Preliminary Injunction, the District Court relied upon Ninth Circuit's recent decision in *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997). In *San Antonio*, the Ninth Circuit upheld an injunction against the same union's use of a banner that used the term "rat" in the same manner. There, the banners read, "This Medical Facility is Full of Rats." *San Antonio*, 125 F.3d at 1232. The Ninth Circuit extensively analyzed the Union's use of the term "rat," and determined that it was fraudulent in that context. *Id.* at 1234-337.

In this case, the District Court issued an injunction similar to the one issued and affirmed in *San Antonio*. Here, the District Court ordered as follows:

> It is hereby ordered that Defendant and all persons acting by, through and in concert with them are enjoined from engaging the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark

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[1] In addition to a finding of fraud or violence, the District Court also had to have found that certain requirements of the NLA were met. Those prerequisites are that: (1) the court conduct a live hearing (29 U.S.C. § 107); (2) unlawful acts were threatened and would continue unless restrained (29 U.S.C. § 107(a)); (3) substantial and irreparable injury to Anheuser-Busch would follow (29 U.S.C. § 107(b)); (4) greater injury would be inflicted on Anheuser-Busch if the injunction were denied than would be inflicted on the Union if the injunction were granted (29 U.S.C. § 107(c)); (5) Anheuser-Busch has no adequate remedy at law (29 U.S.C. § 107(d)); (6) the public officers charged with protecting Anheuser-Busch were unwilling or unable to furnish adequate protection (29 U.S.C. § 107(e)); (7) Anheuser-Busch made every reasonable effort to settle its dispute with the Union (29 U.S.C. § 108); and (8) the District Court made findings of fact before issuing the preliminary injunction (29 U.S.C. § 109).

> in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "Rats" as they recently have in their banner display in front of Plaintiff's facility.
>
> Defendants are free to publicize and advertis[e] with blunt, intemperate, abusive, insulting, or imprecatory language, the existence of truthful facts involved in their labor dispute. App. C, 11a.

After the court issued the injunction, the Union continued to publicize its labor dispute with HMS by displaying banners that stated "ANHEUSER-BUSCH HAS SCABS IN ITS BREWERY." Anheuser-Busch did not challenge the Union's use of those banners.

The Union appealed from the District Court's grant of the injunction. On February 27, 1998, a Ninth Circuit panel issued a *per curiam* opinion, affirming the District Court's grant of the preliminary injunction. The Ninth Circuit panel found that the District Court did not abuse its discretion in granting the preliminary injunction, or base its decision on an erroneous legal standard or clearly erroneous findings of fact. App. B, 3a-4a.

On June 27, 1998, the Union filed and served a Petition for Writ of Certiorari. On August 24, 1998, Anheuser-Busch received a letter from the Clerk of the United States Supreme Court, requesting that Anheuser-Busch file a response. Pursuant to Anheuser-Busch's request for an extension of time in which to file a response, Anheuser-Bush's response is due on September 28, 1998.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's Order Is Nonprecedential.

The Ninth Circuit's order summarily affirms the District Court's order granting a preliminary injunction against the Union's banner display. The order does not explain in detail the basis for its ruling. App. B. The order cannot be cited to or relied upon by other courts in the Ninth Circuit (Ninth Circuit Rule 36-3), or by courts in other circuits. Moreover, this case intertwines a unique set of facts and legal issues that are unlikely to arise again in the same manner. Therefore, there is no compelling reason for this Court to use its sought after resources in a case so limited to its specific facts, and one in which the Ninth Circuit did not issue a published opinion.

B. The Ninth Circuit Applied The Proper Standard Of Review.

The Union suggests that the Ninth Circuit should have conducted an independent review of *all* of the District Court's factual findings, rather than adhering to the "abuse of discretion" standard of review which normally applies to preliminary injunctions. Petition, 24-25. However, where First Amendment issues are present, an appellate court's duty to conduct an independent review does not extend to all of the lower court's factual findings, but rather, is limited to constitutionally significant facts. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 414 n.31, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). In *Bose*, this Court explained the scope of an appellate court's independent review:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not

> actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. . . .

Bose, 466 U.S. at 514, n.31.

Thus, it is important to clarify at the outset that the Ninth Circuit indeed applied the proper standard of review to the District Court's various findings relating to the NLA prerequisites. *See Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 45 (8th Cir. 1946) ("Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees [under the NLA] *are not clearly erroneous*, the decree appealed from is affirmed.") (emphasis added).

If the independent review standard applies in this case at all, it applies only to the facts which determine whether the Union's banner statement was constitutionally protected. In other words, the only factual determinations that could conceivably require a *de novo* review would be whether the Union's "rat" statement was false, and whether the Union made the statement with "actual malice" — that is, knowledge that it was false, or with reckless disregard for whether the statement was true or false. *See Bose*, 466 U.S. at 514, n.31. If the Ninth Circuit had conducted an independent review of these factual findings, it would, without a doubt, have reached the same conclusion that it did in its unpublished decision.[2] Therefore, regardless of the standard

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[2] The evidence on these issues was straightforward and undisputed. First, it is undisputed that the Union's "rat" statement had two meanings, one of which clearly was false. The evidence submitted to the District Court established that Anheuser-Busch did not have rodents in its Van Nuys brewery. *See also San Antonio*, 125 F.3d at 1236 ("[T]he manner in which the Union used the term "rat" on its banner could cause most — if not all — readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true.") In determining that the "rat" statement in this case was misleading, the District Court relied upon

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of review the Ninth Circuit applied, it would have reached the same conclusion.

C. The Ninth Circuit's Order Is Consistent With Federal Court Precedent Regarding The Granting Of Injunctions Under The Norris La-Guardia Act.

The Norris La-Guardia Act ("NLA") generally prohibits federal courts from issuing injunctions in cases involving labor disputes, "except in a strict conformity with the provisions of this chapter." 29 U.S.C. § 101. The NLA limits district courts' power to issue preliminary injunctions that would prevent unions from "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method *not involving fraud or violence*." 29 U.S.C. § 104(e) (emphasis added). Therefore, in addition to satisfying the traditional requirements for a preliminary injunction, and providing evidence of fraud or violence, a party seeking an injunction in a labor dispute must prove additional elements. *See supra* note 1. Although these conditions are rigorous, when they are satisfied, federal courts have the power to grant injunctions in labor disputes.

Moreover, the courts and legislature explicitly have excluded unlawful conduct from the purview of the NLA so that federal courts may fashion injunctive relief which

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(fn. continued)
the Ninth Circuit's analysis of the same statement in *San Antonio.*

Second, upon an independent review, the Ninth Circuit easily would have determined that the Union made the "rat" statement with "actual malice." The Union never has contended that it believed there were rats in the Van Nuys brewery, even though that was a message it intended to convey. Evidence of the Union's knowledge and intent was contained in the videotape of a Union member's statement about "rats in the beer." *See also San Antonio*, 125 F.3d at 1236 ("The most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem. This, the Union concedes, is not true, nor has the Union ever believed it to be true.")

balances both the state's interest in protecting citizens from malicious attacks and a union's right to peacefully and truthfully publish information regarding a labor dispute. *Oman Construction Co. v. International Brotherhood of Teamsters*, 263 F. Supp. 181 (M.D. Tenn. 1966).

In *Oman*, the district court held:

> *[N]orris-LaGuardia is not an unqualified prohibition against injunctions.* . . . [T]hese sections establish that Congress did not withdraw jurisdiction from the courts to grant injunctions in labor disputes but, instead, merely delineated those circumstances under which the remedy of injunction would or would not be available.

Oman, 263 F. Supp. at 183. *See also New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 562-63, 58 S. Ct. 703, 82 L. Ed. 1012 (1938) (by enactment of the NLA, "[i]t was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.") (footnote omitted); *San Antonio*, 125 F.3d at 1235 ("The license to use inflammatory rhetoric during a labor dispute, however, is not unbridled under the NLA"); *International Ass'n of Bridge, Structural and Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 617 (8th Cir.) (with the NLA, Congress intended to leave the federal courts free to enjoin acts of fraud or violence), *cert. denied*, 314 U.S. 639, 62 S. Ct. 75, 86 L. Ed. 513 (1941); *Pocahontas Terminal Corp. v. Portland Bldg. and Constr. Trade Council*, 93 F. Supp. 217, 224 (D. Me.

1950) (the NLA does not deprive federal courts of the power to enjoin picketing involving fraud or violence).

Thus, in cases like this, where a party to a labor dispute communicates by fraudulent methods, the courts have authority to provide injunctive relief. In granting and affirming the preliminary injunction in this case, the District Court and the Ninth Circuit relied upon *San Antonio,* in which the district court issued and the Ninth Circuit affirmed a preliminary injunction enjoining fraudulent speech.

In *San Antonio*, the Ninth Circuit upheld an almost identical preliminary injunction against the same union, enjoining almost exactly the same banner statement. There, the Union displayed a banner near a hospital's maternity ward entrance, which stated: "This Medical Facility Is Full Of Rats." *Id.* at 1230. The Ninth Circuit extensively analyzed the Union's use of the term "rats," and found that "[t]he most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem." *Id. at 1235.*[3]

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[3] In *San Antonio*, the Ninth Circuit easily distinguished other cases in which courts have found such terms as "scab" and "rat" permissible in the context of a labor dispute. Regarding *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264, 283, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), in which the Supreme Court found that a union's use of the term "scab" could not be the basis for a libel judgment, the *San Antonio* Court stated:

> But the distinction between the union's use of the word 'scab' in Letter Carriers and the Union's use of the phrase 'THIS MEDICAL FACILITY IS FULL OF RATS' in this case is patent. Nobody would have understood the union in Letter Carriers to be referring to the nonunion workers as 'crust[s] of hardened blood—and serum over a wound,' or 'scabies of domestic animals.' See Webster's New Collegiate Dictionary 1021 (defining 'scab'). By contrast, the manner in which the Union used the term 'rat' on its banner could cause most — if not all — readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true. *San Antonio,* 125 F.3d at 1236.

The Ninth Circuit also pointed out the same distinction with respect to other cases in which unions have used the term "rat." In *Beverly Hills*

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Upon concluding that the Union's banner statement was fraudulent, the *San Antonio* Court then found that all of the procedural prerequisites of the Norris La-Guardia Act were satisfied, and affirmed the District Court's injunction. *Id.* at 1237-38. The District Court had ordered that the Union's members were "preliminarily enjoined from using the term, 'Rats,' as they currently have in their banner which they display in front of plaintiff San Antonio Community Hospital." *Id.* at 1233. The Ninth Circuit concluded that the District Court had crafted a narrow injunction that prohibited the fraudulent manner in which the Union used the term "rats," but did not prohibit the use of the term itself. *Id.* at 1238. Indeed, the Union later displayed a second banner alongside the original banner which identified the "rat contractor" as "Best Interiors." The court ruled that the second sign clarified the first sign, and that showing both signs in tandem did not constitute fraud. *Id.*

In this case, the District Court's and the Ninth Circuit's decisions are not only consistent with the Ninth Circuit's recent *San Antonio* decision, they also are consistent with the

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(fn. continued)
Foodland, Inc. v. United Food & Commercial Workers' Union, 840 F. Supp. 697 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994), the court ruled that a union handbill entitled "Don't Help Feed the Rat" was protected speech, because the use of the word "rat" could not be construed as a misrepresentation of fact. 'No one could read the handbill and believe that the owner/manger of Foodland was actually a rodent animal.' *San Antonio*, 125 F.3d at 1236 (*citing Beverly Hills Foodland, Inc.*, 840 F. Supp. at 705).

The *San Antonio* Court similarly distinguished the "rat" statement in *BE&K Construction Co. v. NLRB*, 23 F.3d 1459 (8th Cir. 1994), *cert. denied sub nom*, 513 U.S. 1076, 115 S. Ct. 721, 130 L. Ed. 2d 627 (1995). There, "the court noted that it was not improper for a union publication to urge 'solidarity' against BE&K, and describe the company as a 'rat *contractor*.' *Id.* at 1463." The *San Antonio* Court explained that, in this context, the use of the term "rat" to describe management was not deceptive or designed to mislead members of the public. "No reasonable reader would have believed, based on the newsletter, that the contractor was actually a four-legged rat. The same cannot be said in this case." *San Antonio*, 125 F.3d at 1236.

law in other circuits that have addressed similar issues. For instance, in *Mercy Health Services v. 1199 Health and Human Service Employees Union*, 888 F. Supp. 828 (W.D. Mich. 1995), Mercy Health Services ("MHS") sought and obtained an injunction against a union's dissemination of defamatory radio and television commercials. The union was involved in a labor dispute with one of MHS's hospitals in New York, but it broadcast commercials in Michigan, falsely stating that MHS hired inexperienced nurses, wasted money on conflicts with its nurses that could have been spent to provide better care, and recently caused 80% of its nurses to walk out, replacing them with inexperienced nurses. *Id.* at 830.

The district court granted a preliminary injunction, finding that the commercials were intentionally misleading because they failed to disclose that the labor dispute was not in Michigan. *Id.* at 835. Furthermore, the district court found that the commercials were defamatory, as they attempted to frighten Michigan residents into believing that MHS's hospitals in Michigan could not deliver adequate care, because they were staffed with untrained, inexperienced nurses. *Id.*

In enjoining the union's misleading statements, the district court found that the NLA did not prohibit it from issuing the injunction, because there was no labor dispute between the union and MHS. *Id.* at 837. However, the district court also rejected the union's First Amendment argument, because "in order to receive First Amendment protection, commercial speech must concern lawful activity and cannot be defamatory." *Id.* at 838. The Sixth Circuit denied a stay of the preliminary injunction. *Id.* at 831.

In a case from the Eighth Circuit, *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38 (8th Cir. 1946), the district court did not hesitate to find that a union's false statements made in the context of a labor dispute, were fraudulent. There, the union was alleged to have made false and malicious statements regarding working conditions at the Donnelly Company's plant. *Id.* at 42. The false statements were

publicized in advertisements throughout the country, and were made for the purpose of inducing customers of Donnelly to sever commercial relations with it, and thus to compel Donnelly to accede to the demands of the union. *Id.* at 43.

In *Donnelly*, the district court found the union's statements to be false, but could not enjoin them, because Donnelly failed to meet all of the prerequisites of the NLA. Specifically, Donnelly failed to show that the fraudulent acts committed in the past would continue into the future if not restrained. *Id.* at 43. However, in affirming the district court's denial of the injunction as not "clearly erroneous," the Eighth Circuit observed:

> Fraud and violence are as unlawful and as reprehensible in a labor controversy as elsewhere. But in an action for an injunction in a labor dispute the trial court is required to make certain findings as a prerequisite to the power and jurisdiction of the court to grant an injunction. . . . Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees are not clearly erroneous, the decree appealed from is affirmed.

Id. at 45.

As the cases cited above demonstrate, when fraud is shown, and the NLA's prerequisites have been satisfied, courts can and should enjoin such conduct. The Union, however, portrays the Ninth Circuit's recent decisions in this case and in *San Antonio* as approval of "cavalier judicial suppression of speech" that will lead to a "downward spiral in the protection of labor speech." Petition, 13. But it is not surprising that the Ninth Circuit has twice affirmed injunctions under the NLA in a short period of time, because the statement and the context of the statement were almost identical in both cases. Both here and in *San Antonio*, the same union displayed the same banner statement, implying that

there were rodents in either a hospital, or a facility where consumable products are produced — both environments where cleanliness is paramount. The Union has cited no cases (and there are none reported), where any court has denied an injunction based on these specific and unique facts. Because both the Ninth Circuit's decisions in this case and in *San Antonio* are truly limited to their facts, it is difficult to imagine how either decision (especially the one in this case, since it is unreported) could be used to suppress constitutionally protected speech in other contexts.

In any event, the Ninth Circuit's unreported decision in this case is consistent with the law of the Ninth Circuit, as well as the law in the Sixth and Eighth circuits, the only other circuits that have addressed similar issues. Because the Ninth Circuit's decision in this case does not stray from established legal principles, this Court should deny the Union's Petition.

D. The Ninth Circuit Correctly Concluded That Anheuser-Busch Met All Of The Procedural Requirements Of The Norris La-Guardia Act.

The Union challenges the Ninth Circuit's approval of the District Court's findings on three of the NLA's requirements. First, the Union argues that the District Court did not meet the live-hearing requirement. Second, the Union claims that the District Court did not find that unlawful acts were committed and would continue unless restrained. Third, the Union asserts that the District Court incorrectly found that a greater injury would be inflicted upon Anheuser-Busch if the Union's banners were not enjoined than would be inflicted upon the Union by granting the injunction. Both the District Court and the Ninth Circuit correctly concluded that these three NLA prerequisites were satisfied.

1. The Ninth Circuit's application of the live-hearing requirement is consistent with the decisions of other federal courts that have addressed the issue under similar facts.

The Union asserts that the injunction issued in this case violates the NLA, because the District Court did not hear live testimony at the preliminary injunction hearing. Petition, 15. The Union makes this assertion despite the fact that it did not request the opportunity to present live testimony at the hearing. The Union also suggests that the federal courts of appeal are divided on the question of whether a district court's failure to conduct a live hearing is reversible error. Petition, 16 & n.8.

The Union is wrong on both counts. First, there is no split in the circuits. Rather, the cases in which appellate courts have reversed injunctions because of failure to satisfy the live-hearing requirement simply are factually distinct from this case. On the other hand, courts that have addressed the issue under facts similar to those present in this case consistently hold that the failure to hold a live hearing is not reversible error. The purpose of the live-hearing requirement, after all, is to ensure that courts issue injunctions "only after consideration of all the facts and arguments deemed important by the parties." *Drywall Tapers and Pointers v. Operative Plasterers' and Cement Masons' Ass'n.*, 537 F.2d 669, 674 (2d Cir. 1976), *cert. denied*, 444 U.S. 1073, 100 S. Ct. 1018, 62 L. Ed. 2d 755 (1980). In certain circumstances, such as when the facts are undisputed, or live testimony would duplicate evidence already submitted to the court, the objectives of the NLA are satisfied, and failure to hold a live hearing is not error.

The facts of *Drywall Tapers and Pointers* are illustrative. In that case, a union appealed from the district court's grant of an injunction on the ground that the district court did not comply with the NLA's live-hearing requirement. *Id.* at 674. The court of appeals upheld the injunction because, under the

circumstances of the case, live testimony was unnecessary. The court explained:

> The obvious purpose of the hearing requirements is to prevent grants of injunctions on ex parte applications and to ensure that relief follows only after consideration of all facts and arguments deemed important by the parties. In the present case, both sides submitted voluminous affidavits prior to . . . [the court's] decision. Appellants were obviously content to rest on that evidence, as they never requested a further hearing. Finally, the question of the validity of [a contract] was not a question that would be subject to greater elucidation by live testimony. . . . *Thus the documentary evidence presented to [the court] by both sides was sufficient to satisfy the hearing requirement and enable the court to decide whether an injunction should issue.*

Id. (emphasis added). *See also International Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290-91 (7th Cir. 1981) (district court not required to hold live hearing because facts underlying request for injunctive relief were undisputed and employer's counsel did not request full evidentiary hearing); *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974) ("a court might issue an injunction against [a party] without taking testimony if on the undisputed facts the balance tipped decisively in favor of the [other party] and the other criteria governing the issuance of injunctions were met."); *Railway Express Agency, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks*, 437 F.2d 388, 395 (5th Cir.) (where resolution of the few disputed facts in favor of appellants would not affect the nature of the controversy, section 107 did not require an evidentiary hearing), *cert. denied*, 403 U.S. 919, 91 S. Ct. 2230, 29 L. Ed. 2d 696 (1971).

The cases the Union cites from the First, Fourth, Third and Sixth Circuits (Petition, 16, n.8), in which courts found

that a live hearing was required, involved disputed issues of fact, or situations in which district courts granted injunctions with no evidence at all. For instance, in *International Union UAW v. LaSalle Machine Tool*, 696 F.2d 452 (6th Cir. 1982), a live hearing was required to resolve disputed issues of fact. There, the district court granted a preliminary injunction, enjoining the employer from selling certain equipment which the union believed would result in loss of employment of its members. The injunction maintained the status quo pending arbitration of the issue. *Id.* at 454.

On appeal, the Sixth Circuit reversed the district court's order granting an injunction, because several procedural requirements of the NLA, including the live-hearing requirement, were not satisfied. However, the Sixth Circuit expressly stated that a live hearing was mandated in that case, precisely because there were factual disputes: "There was a clear issue of fact in this case as to whether sale of the machinery as proposed by the employer would inevitably lead to subcontracting of work contrary to the Letter of Understanding .... A hearing was required on this issue." *Id.* at 457. *See also United Telegraph Workers v. Western Union*, 771 F.2d 699, 765 (3d Cir. 1985) (reversing district court's order granting injunction because of failure to comply with prerequisites of NLA, including live-hearing requirement; because record contained clearly disputed facts, Third Circuit declined to decide whether exception to live-hearing requirement exists where there is no dispute).

In other cases the Union cites, the district courts based the injunctions on no evidence whatsoever. *See District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993) (injunction vacated because of district court's failure to comply with prerequisites of NLA, including live-hearing requirement; the district court received *no evidence*, and heard *no witnesses*, but simply based its ruling on the in chambers argument of counsel) (emphasis added); *In Re District No. 1-Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70, 74, 76 (D.C. Cir.

1983) (reversing district court's issuance of temporary restraining order, which actually amounted to a preliminary injunction prohibiting union from pursuing arbitration; district court failed to comply with prerequisites of NLA, including live-hearing requirement, and received no evidence, because it thought it was issuing a temporary restraining order, not a preliminary injunction); *Tejidos De Coamo, Inc. v. ILGWU*, 22 F.3d 8, 14 (1st Cir. 1994) (reversing district court's order granting a stay of pending arbitration proceedings, because none of the NLA requirements were met, but noting that district court did not make any factual findings because it believed it was staying an arbitration, not granting an injunction pursuant to the NLA; First Circuit also indicated that satisfaction of the live-hearing requirement was not necessarily required in all cases: "*There may be cases where one or another of these procedural requirements is waived or its omission is manifestly harmless*; but the lack of substantive findings cannot be so easily ignored.") (emphasis added).

In this case, the Ninth Circuit correctly concluded that all of the requirements of the NLA were satisfied, including the live-hearing requirement. The District Court based its factual findings on declarations submitted at the hearing, and summaries which contained the proposed testimony of the witnesses. In addition, all of the witnesses were present at the hearing in the event that live testimony was necessary. Most importantly, the evidence was undisputed, as both Anheuser-Busch and the Union submitted written evidence and photographs identically describing the banners. As the District Court stated in its order, it found "no disagreement between the parties as to the underlying facts and the parties filed materially identical photographic exhibits depicting the banners." The District Court concluded that its "findings of fact and the documentary evidence submitted by the parties rendered the proposed live testimony cumulative." App. C, 9a. The cumulative nature of the proposed testimony is underscored by the fact the Union itself, at the hearing, did

not request at any time the opportunity to present live testimony.

As the cases cited above demonstrate, the Ninth Circuit's decision in this case is consistent with the decisions of other circuits that have considered the live hearing issue under similar facts. Because the Ninth Circuit's decision merely follows established legal principles, the Supreme Court should not use its valued resources to consider this settled question of law.

2. Contrary to the Union's assertion, the District Court found, and the Ninth Circuit correctly affirmed, that unlawful acts had been committed and would continue unless restrained.

Rule 15.1 of this Court provides that "a brief in opposition to a petition for a writ of certiorari . . . should address any perceived misstatements of fact or law set forth in the petition." The Union asserts that the District Court did not find that any of the Union's acts were unlawful, but only that Anheuser-Busch demonstrated probable success on the merits of its claims for fraud and trademark dilution. Petition, 16. The Union is mistaken.

Indeed, the District Court independently addressed both the question of whether unlawful acts had been committed, and the separate question of probable success on the merits of Anheuser-Bush's claims. With respect to the first of these issues, the District Court explicitly found that "[t]hat unlawful acts have been threatened and will be committed unless restrained. . . . 29 U.S.C. § 107(a). Defendants displayed their poster intermittently over the course of a month. The declarations of the parties and proffered testimony establish this element." App. C, 8a.

3. The District Court also correctly found, and the Ninth Circuit properly affirmed, that Anheuser-Busch demonstrated probable success on the merits of its common law and trademark dilution claims.

Although the Union only indirectly challenges the Ninth Circuit's decision on the element of "probable success on the merits" (*see supra* Section D.2), Anheuser-Busch will briefly address that contention. Applying the proper abuse of discretion standard (*see supra* Section B), The Ninth Circuit explicitly found that "the district court did not rely upon an erroneous legal premise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient to warrant the preliminary injunctive relief." App. B, 4a. In any event, should this Court conclude that the Ninth Circuit should have reviewed the District Court's factual findings on this issue *de novo*, Anheuser-Busch submits that the Ninth Circuit would still have affirmed the District Court's decision.

(a) The fraud claim.

The Union makes much of the fact that Anheuser-Busch's original complaint labeled its common law claim as one for "fraud," even though it did not intend to state a common law cause of action for fraud. Petition, 17. As set forth in Anheuser-Busch's Answering Brief to the Ninth Circuit, the allegations of Anheuser-Busch's complaint make it clear that Anheuser-Busch's theory of liability is predicated upon the facts that the Union falsely represented to the public that Anheuser-Busch's Van Nuys facility was infested with rodents and, as a result of that false statement, Anheuser-Busch's business reputation was damaged. Those allegations

are the basis for a variety of torts.[4] The District Court found, and the Ninth Circuit correctly affirmed, that the Union's banner statements disparaged Anheuser-Busch's product and, therefore, Anheuser-Busch showed a probable chance of success on the merits of any claim where a finding of fraud is required.

(b) The trademark dilution claim.

The Union also challenges the District Court's finding that the Union's banner statement violated the Lanham Act, because it claims that its use of the Budweiser trademark was not a "commercial use in commerce." Petition, 17.[5] As was extensively briefed to the Ninth Circuit, the relevant case law supports Anheuser-Busch's position that the Union's use of the Budweiser trademark was "commercial" for purposes of the Lanham Act. Contrary to the Union's position, speech which occurs within the context of a labor dispute is not immune from the Lanham Act.

For instance, in *Brach Van Houten Holding v. Save Brach's Coalition*, 856 F. Supp. 472 (N.D. Ill. 1994), a coalition (which included a Teamsters local), used Brach's

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[4] For instance, "trade libel" is 'an intentional disparagement of the quality of property, which results in pecuniary damage.' *Aetna Casualty and Surety Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988). "Product disparagement" is an injurious falsehood that interferes with business. *Guess, Inc. v. Superior Court*, 176 Cal. App. 3d 473, 479, 222 Cal. Rptr. 79 (1986).

[5] On appeal to the Ninth Circuit, the Union argued that its use of the Budweiser trademark was "noncommercial," pursuant to the Lanham Act's "noncommercial use" exception. *See* 15 U.S.C. § 1125(c)(4)(B).

However, the Union never argued below the separate issue of whether its use of the Budweiser trademark was a use "in commerce." Therefore, the question is not properly before this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) ('Ordinarily, this Court does not decide questions not raised or resolved in the lower court.').

trademark logo in its effort to prevent Brach's from closing one of its candy factories. *Id.* at 474. The coalition, calling itself "Save Brach's," submitted a proposal to save the factory, which proposed significant changes in management. *Id.* Brach's rejected the proposal and, seeking to enjoin Save Brach's from using Brach's logo, asserted trademark infringement claims under the Lanham Act. *Id.*

The court, while noting that the coalition's goals were laudable, still found that "Save Brach's activities clearly seem[ed] to be 'commercial activities' as contemplated by section 1125(a)(1)(A) [of the Lanham Act]." *Id.* at 474, 476. *See generally Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) ("We do not suggest that communications by labor unions are never of the commercial speech variety. . . ."); *Mercy Health Services v. 1199 Health and Human Service Employees Union*, 888 F. Supp. 828, 838 (W.D. Mich. 1995) (enjoining union from falsely publicizing in furtherance of a labor dispute, statements to the effect that hospital hired inexperienced nurses; declining to decide whether plaintiff had stated a claim under Lanham Act, but rejecting union's First Amendment argument because "*commercial speech* must concern lawful activity and cannot be defamatory.") (emphasis added).

As the case law indicates, use of a trademark within the context of a labor dispute may be "commercial" and, therefore, may be the subject of a claim for trademark dilution. Therefore, the District court properly found, and the Ninth Circuit properly affirmed, that Anheuser-Busch demonstrated probable success on the merits of its trademark dilution claim.

4. The Ninth Circuit correctly found that the District Court did not abuse its discretion in its balance of the hardships.

The Union also asserts that the Ninth Circuit, in upholding the District Court's injunction, applied the NLA fraud exception "exceedingly broadly," without giving weight to the fact that granting the injunction would harm the Union by "sap[ping] the message of its vigor." Petition, 19. The Union does acknowledge, however, that the injunction left it free to advertise its labor dispute. Petition, 19. As set forth below, the District Court's injunction was narrowly tailored to prohibit only the false statement that Anheuser-Busch's Van Nuys facility has a rodent problem. *See* App. C, 11a. Therefore, because the Union was not prohibited from publicizing its labor dispute, and had many alternate methods of communicating its message, the District Court properly balanced the hardships, and the Ninth Circuit correctly affirmed that assessment.

E. The Ninth Circuit's Order Does Not Violate The First Amendment.

The Union concedes, as it must, that false speech is not protected by the First Amendment. Petition, 21. That should end the matter, because the Union's banner statement, as it would most commonly be understood, is false. The District Court concluded that the Union's banner statement implied that there were four-legged rats in Anheuser-Busch's Van Nuys brewery. App. C, 7a. Another District Court, as well as the Ninth Circuit, previously determined that the same statement would most naturally be understood to mean that the facility had a rodent problem. *See San Antonio,* 125 F.3d at 1236. The statement, therefore, is undeniably false, because the Union never believed Anheuser-Bush's Van Nuys facility had a rodent problem. *See supra* note 2.

Having so concluded, the District Court did not reach the Union's First Amendment arguments, because the First Amendment does not protect fraud. *See San Antonio*, 125 F.3d at 1239 (prior restraint issue rendered moot by finding that Union's banner display was fraudulent, because "[t]he First Amendment does not protect fraud.") (citations omitted); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993) (upholding injunction prohibiting false advertising; "[T]he prior restraint doctrine does not apply in this case because there has been 'an adequate determination that [the expression] is unprotected by the First Amendment.' ").

The Union's banner does not deserve more or less constitutional protection because it appeared in the context of a labor dispute. As the District Court correctly concluded, and the Ninth Circuit affirmed, the banner may be enjoined because it contains a false statement. As this Court has held, false statements of fact are not exempt from the limits of the First Amendment just because they are made in the context of a labor dispute. *See Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).

In *Linn*, in the context of a union organizing campaign, this Court recognized that fraudulent or defamatory publications which occur in labor disputes are outside the protection of the First Amendment:

> [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. *The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.*

Id. at 63 (emphasis added).[6]

Moreover, courts also hold that injunctive relief may be the proper remedy for fraudulent speech, even when it occurs in the context of a labor dispute. In *Magill Brothers, Inc. v. Building Service Employees' International Union*, 20 Cal. 2d 506, 127 P.2d 542 (1942), the California Supreme Court held that neither the California nor the Federal Constitution proscribe an injunction which prohibits the fraudulent publication of information in a labor dispute:

> The policy of this state which characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech.

Id. at 512.[7]

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[6] *See also Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 600, 131 Cal. Rptr. 641 (1976) (relying upon United States Supreme court's statements in *Linn*; California courts only extend "constitutional protection to statements relating to labor disputes, so long as they are not made maliciously"); *Di Giorgio Fruit Corp. v. AFL-CIO*, 215 Cal. App. 2d 560, 568, 30 Cal. Rptr. 350 (1963) (parties to a labor dispute do not have Constitutional protection to make a "false and malicious statement."); *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 154, 143 P.2d 20 (1943) ("Although the publicizing of the facts of a labor dispute in a peaceful manner is within the liberty of free discussion guaranteed by the Fourteenth Amendment to the United States Constitution, *a party to the controversy has no absolute privilege to discuss such matters so as to avoid civil responsibility for injury to another caused by a malicious and false statement made in the course of differences between them.*") (emphasis added).

[7] *See also Seven Up Bottling Co. v. Grocery Drivers Union*, 40 Cal. 2d 368, 374-75, 254 P.2d 544 (1953) ('[I]t appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful.'); *Hughes v. Superior Court*, 32 Cal. 2d 850, 854, 198 P.2d 885 (1948) ("[T]he right to picket peacefully and *truthfully* is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech. Nevertheless, . . . the state may protect against abuses of the right; the object of concerted labor activity must be proper and . . . *must be sought by lawful means*, otherwise the persons injured by such activity may obtain damages or *injunctive relief.*") (emphasis added), *aff'd*, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950).

Despite the abundance of legal authority which confirms that the Union's banner statement is not constitutionally protected, the Union still contends that courts cannot enjoin "allegedly" false speech that has not yet taken place, and courts cannot enjoin speech upon a showing of probable success on the merits. Petition, 23. Neither argument is compelling. First, for several reasons discussed below, the District Court's injunction was not a prior restraint. Second, the District Court did not base its injunction solely on a showing of probable success on the merits. It also found that the Union had committed the unlawful act of fraud, and would continue to do so unless enjoined. App. C, 8a. *See supra* Section D2.[8]

1. The preliminary injunction is not a prior restraint on speech, because the District Court issued it after the Union displayed its banner.

It is axiomatic that a prior restraint can only exist where the court seeks to repress a statement in advance of its publication. *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468 (1975). The Union claims that the District Court's injunction was improper, because "there can be no injunctions against expression that has not yet taken place." Petition, 22. That is not what happened here. The District Court made no restriction prior to the publication of the Union's banner statement. Rather, the Union displayed its banner with the false "rat" statement for approximately a

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[8] In any event, the cases that the Union cites in support of this proposition are inapposite. Petition, 23. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989) (discussing "probable cause" standard under Fourth Amendment for searches and seizures of allegedly obscene materials potentially protected by First Amendment); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980) (holding that Texas public nuisance statute could not be used to prohibit motion picture exhibitors from exhibiting *named and unnamed* films, *without regard to the context* in which they were displayed).

month, and would have continued to display it, unless ordered by the District Court to stop. The injunction in this case sought only to enjoin the currently published and undisputedly false statement regarding the presence of rats in the brewery. The District Court's injunction allowed the Union the opportunity to continue to publicize its labor dispute using the term "rat," as long as the Union did not falsely imply that there were rodents in the Anheuser-Busch's Van Nuys brewery. Therefore, the District Court's preliminary injunction is not a prior restraint on speech.

2. The preliminary injunction is not a prior restraint because it is narrowly tailored to prohibit only the Union's use of the term "rats" as it had used it in its banner.

The District Court's order prohibited the Union from engaging in the following acts at Anheuser-Busch's Van Nuys facility:

> Using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "rats" as they recently have in their banner display in front of Plaintiff's facility. App. C, 11a.

The Union complains that the injunction prohibits it from engaging in *any* future disparagement of Anheuser-Busch's product, no matter how it is carried out. The Union's concern is more speculative than real. The order does not prohibit the Union from disparaging Anheuser-Busch's products, as long as it is done in a truthful manner. The injunction only enjoins the Union from representing the *false* notions that the Anheuser-Busch's Van Nuys facility has rats or any other problem affecting the purity of its product.

Thus, the District Court's injunction is narrowly tailored to eliminate only the specific harm alleged. *See Castrol Inc.*, 987 F.2d at 949 (injunction prohibiting false advertising upheld against First Amendment challenge; "The injunction is . . . not overbroad because it only reaches the specific claims that the district court found to be literally false.")

Indeed, the District Court's order specifically states that the Union "is free to advertis[e] with blunt, intemperate, abusive, insulting, or deprecatory language, the existence of and truthful facts involved in their labor dispute." The Union's replacement banner, stating that "Anheuser-Busch Has Scabs In Its Brewery," demonstrates that the Union easily complied with the Court's order, and continued to publicize its labor dispute. Because the District Court's order only prohibits the Union from making false assertions about the purity of Anheuser-Busch's product, but leaves the Union with many alternative methods of publicizing its dispute with HMS, the order is not unconstitutionally vague. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (zoning ordinance regulating location of theatres featuring "adult movies" characterized by "an emphasis on sexual matters" upheld against vagueness challenge because ordinance would not have a "significant deterrent effect" on films protected by the First Amendment).

3. The preliminary injunction is not a prior restraint, because it enjoins conduct, not speech.

In *R. A. V. v. St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), the Supreme Court explained that certain forms of expression may be prohibited in an attempt to regulate conduct:

> Since words can in some circumstances violate laws directed not against speech but against conduct . . ., a particular content-based subcategory of a prescribable class of speech can be swept up

> incidentally within the reach of a statute directed at conduct rather than speech.

R. A. V., 505 U.S. at 389. Although the Court invalidated the statute in *R. A. V.*, it recognized that where a content-neutral regulation prohibits particular conduct, and is not specifically targeted at expressive speech, it is not a prior restraint. *Id.* at 390. *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (zoning restrictions on adult movie theaters upheld in order to prevent urban blight, even though ordinances incidentally affected free speech issues), *reh'g denied*, 475 U.S. 1132, 106 S. Ct. 1663, 90 L. Ed. 2d 205 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (where an injunction is designed to prevent a secondary effect of speech, traditional prohibitions against prior restraints will not prevent a court from issuing an injunction because "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").[9]

The Ninth Circuit applied this concept in *Martin v. Reynolds Metals Company*, 224 F. Supp. 978 (D. Or. 1963), *aff'd*, 337 F.2d 780 (9th Cir. 1964). There, the plaintiff published a sign falsely stating that Reynolds' aluminum plant was poisoning his cattle. The court held that an injunction should issue, and that it was not a prior restraint because the defendant was publishing false statements which impinged upon the plaintiff's business reputation:

> The Supreme Court has held that the Constitution does not protect publications which are lewd, obscene, profane, or merely libelous from injunction. . . . Martin's avowed purposes for the sign are private and personal to publicize his lawsuit to compel Reynolds to do as Martin demands.

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[9] According to Professor Tribe, "regulations with only indirect or minor effects on speech are really not prior restraints at all." Tribe, *American Constitutional Law* (2d ed. 1988), p. 10511, n.37.

> The only logical, rational conclusion from the language of the sign is that *the language of the sign is libelous and tortious conduct not in the public interest or for the public interest. . . . [S]uch conduct is not a lawful exercise of free speech under the Federal Constitution and is indeed the very type of conduct which equity is well-equipped and ought to prohibit and protect against.*

Martin, 224 F. Supp. at 985 (emphasis added).

In this case, the District Court's order did not restrict the Union's speech on the basis of the content of the message. Rather, the injunction was narrowly tailored to prohibit the illegal conduct of fraud, while still allowing the Union to publicize its labor dispute. Therefore, the preliminary injunction is not a prior restraint on speech, but rather a prohibition on unlawful, fraudulent conduct.

CONCLUSION

For all of the foregoing reasons, Anheuser-Busch respectfully requests that this Court deny the Union's Petition for Writ of Certiorari.

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Respectfully submitted,

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